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No. 85-502

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NATIONAL ASSOCIATION OF BROADCASTERS, *et al.*,
Petitioners,

v.

QUINCY CABLE TV, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT NATIONAL CABLE TELEVISION ASSOCIATION, INC. IN OPPOSITION

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QUESTIONS PRESENTED

The court below held that the Federal Communications Commission's "must carry" rules, which required cable television operators to carry on their systems all local television stations, were "fundamentally at odds with the First Amendment." Although the FCC has decided not to seek review of the decision, a number of broadcasters and their representatives have petitioned this Court for a writ of certiorari. The questions presented for review are:

1. Do cable systems, in the production of programming and the selection of broadcast signals, satellite-delivered program services, locally originated programming, and other program material to be offered on their channels to subscribers, engage in editorial discretion that is protected by the First Amendment?

2. Did the court below correctly conclude that—even under the lenient First Amendment standards that apply to mere incidental restraints on protected speech, and even assuming that the FCC's asserted purpose for the must carry rules was a substantial governmental interest—the FCC had failed to demonstrate that the rules in fact furthered their intended purpose and that the rules were, in any event, "grossly overinclusive" and "insufficiently tailored to justify their substantial interference with First Amendment rights"?

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BRIEF FOR RESPONDENT NATIONAL CABLE TELEVISION ASSOCIATION, INC. IN OPPOSITION

The National Cable Television Association, Inc. ("NCTA"), respectfully submits this brief in opposition to the Joint Petition for Writ of Certiorari filed by a number of broadcasters and their representatives ("Broadcasters"). NCTA is the principal trade association representing cable television operators in the United States.[1] Its members operate more than 2,100 cable systems serving more than 70 percent of the nation's approximately 40 million cable television subscribers. NCTA was an intervenor in the proceedings below and is, therefore, a respondent in this proceeding.

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[1] NCTA has no parent companies, subsidiaries or affiliates.

STATEMENT OF THE CASE

On July 19, 1985, a panel of the United States Court of Appeals for the District of Columbia Circuit unanimously held that the Federal Communications Commission's "must carry" rules, which generally required cable television systems to retransmit the signals of all television stations that were "significantly viewed" or otherwise deemed "local" by the FCC, were "fundamentally at odds with the First Amendment and, *as currently drafted*, can no longer be permitted to stand."[2] The court found that the rules interfered with cable operators' editorial discretion in the selection of the programming to be transmitted on their channels and that, even under the most lenient of First Amendment standards, the FCC had completely failed to demonstrate that this infringement was necessary or sufficiently tailored to serve a substantial interest. Accordingly, in resolving the two specific cases on review, the court reversed the FCC's orders (1) imposing a fine on Quincy Cable TV, Inc. for failure to comply with the must carry rules and (2) denying Turner Broadcasting System, Inc.'s petition for a rulemaking proceeding to reconsider and delete the existing must carry rules in light of their effect on First Amendment rights.

On August 2, 1985, the FCC, "after much thought about the role of the must carry rules in the mass media marketplace today,"[3] decided not to seek rehearing or Supreme Court review of the decision and indicated that it would decline the Court of Appeals' invitation to attempt, *sua sponte*, "to redraft the rules in a manner more sensitive to . . . First Amendment concerns."[4] Its Chair-

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[2] Slip Opinion, reprinted in Petitioners' Appendix ("Pet. App.") at 8a (emphasis added).

[3] Public Notice, Aug. 2, 1985 (Statement of Chairman Fowler and Commissioners Dawson and Patrick), Pet. App. at 138a.

[4] Slip Opinion, Pet. App. at 60a.

man has made clear, however, that, the FCC "never intended . . . to preclude any party from coming forward with a proposal which would include a set of carefully crafted mandatory carriage rules, and a clear justification of the policy aims and constitutionality of such rules." [5] The FCC would, according to the Chairman, "carefully consider any such petition" in a full rulemaking proceeding.[6] Several of the petitioners in this proceeding are among those who have subsequently filed petitions asking the FCC to institute such a proceeding.[7]

Meanwhile, making no effort to obtain rehearing either by the three-judge panel or by the full Court of Appeals, the Broadcasters asked the Court of Appeals to stay issuance of its mandate pending disposition of the petition for certiorari that they intended to file in this Court. On September 3, 1985, the Court of Appeals denied the Broadcasters' motion.[8] The Broadcasters were similarly unsuccessful in obtaining a stay from the Chief Justice,[9] and the Court of Appeals issued its mandate on September 10, 1985.

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[5] Letter from Chairman Mark S. Fowler to Senator Barry Goldwater (September 24, 1985).

[6] *Id.*

[7] Three such petitions have been filed by: (1) the National Association of Broadcasters, Association of Maximum Service Telecasters, Station Representatives Association, American Broadcasting Companies, Inc., CBS, Inc., National Broadcasting Company, Inc., ABC Television Affiliates Association, Spanish International Communications Corporation, Bahia de San Francisco Television Company, the Seven Hills Television Company, and National Religious Broadcasters; (2) the Association of Independent Television Stations, Inc.; and (3) the National Association of Public Television Stations, the Public Broadcasting Service, and the Corporation for Public Broadcasting.

[8] *Order* (Sept. 3, 1985).

[9] *Order* (Sept. 9, 1985).

ARGUMENT

This is not an appropriate case for review by this Court. First, the decision below, which is carefully limited to the must carry rules "in their current form," [10] properly applies well-established First Amendment principles and raises no novel constitutional issues. Second, the decision is not, as the Broadcasters contend, "inconsistent with the result reached in several decisions of this Court"; [11] this Court has never upheld the constitutionality of the must carry rules or held that cable's protected exercise of editorial discretion is limited to the retransmission of *non-broadcast* programming. Third, the decision below does not create a conflict among the circuits.

Finally, the agency whose rule has been invalidated is not seeking review of the decision below. While the Broadcasters accuse the court below of second-guessing the FCC's supposed determination that the existing must carry rules were "the minimum measures necessary" [12] to protect important policy objectives, the FCC has obviously concluded that those rules are not at all crucial to its task of furthering the public interest.

I. The Decision Below Properly Applies First Amendment Principles and Standards Established by this Court and Raises No Novel Constitutional Issues.

The Court of Appeals held that the must carry rules infringe fundamental First Amendment rights because they interfere with the editorial discretion of cable operators in selecting the programming to be transmitted to subscribers on their systems. Moreover, the rules give preferential treatment and, in some cases, "an overwhelming competitive advantage" [13] to one group of

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[10] Slip Opinion, Pet. App. at 60a.

[11] Petition at 12.

[12] Petition at 20.

[13] Slip Opinion, Pet. App. at 36a.

speakers—local broadcasters—at the expense of non-broadcast cable programmers.

That such effects would be held by this Court to constitute serious infringements of First Amendment rights is indisputable. In cases involving both newspapers and broadcasters. the Court has emphasized the fundamental protection that the First Amendment affords to the exercise of editorial discretion—the "selection and choice of material" to be provided by the media.[14] And in *FCC v. Midwest Video Corp.*, 440 U.S. 689, 707 (1979), the Supreme Court made clear that cable operators also exercise "a significant amount of editorial discretion regarding what their programming will include." [15]

The Court's decisions generally indicate that intrusions on the editorial discretion of the media are not merely "incidental" restrictions on speech but constitute direct suppression of speech. Such restrictions are generally

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[14] *Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 124 (1973). *See also Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974) ("The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper . . . constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.")

[15] The Court of Appeals accurately described the evolution of cable's editorial role:

> Although in cable's infancy cable operators served exclusively as passive conduits of broadcast signals, their editorial role has expanded dramatically over the course of the industry's brief history . . . . [O]perators now select from "a rich variety" of additional options, including locally originated cablecasts, and the programming of over 40 independent cable networks, which offer such diverse fare as movies, sports, news, live coverage of public events, and specialized presentations aimed at individual segments of the national audience.

Slip Opinion, Pet. App. at 37a-38a.

impermissible and can only be justified by a "compelling" state interest, such as national security. The so-called *O'Brien* balancing test—under which a regulation that has only an incidental impact on speech is permissible if "it furthers an important or substantial governmental interest and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest" [16]—does not generally apply to constraints on editorial discretion.

As the Court of Appeals pointed out,

> [i]n *Miami Herald* [*Publishing Co. v. Tornillo*, 418 U.S. 241 (1974)], the Court faced a constitutional challenge to a Florida statute that required newspapers to grant a right to reply to political candidates attacked in earlier editions. *Without so much as alluding to even the possibility of a subordinating governmental interest*, the Court invalidated the statute. Forcing an editor to print that which he otherwise would not, the Court held, was a restraint the First Amendment simply would not tolerate.[17]

Therefore, the Court of Appeals had "serious doubts about the propriety of applying the standard of review reserved for incidental burdens on speech" [18] and would have been well within the ambit of Supreme Court precedents had it applied a more stringent standard.[19] The court did not, however, reach the fundamental question

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[16] *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

[17] Slip Opinion, Pet. App. at 39a-40a (emphasis added).

[18] *Id.* at 39.

[19] In addition to their intrusion on editorial discretion, the must carry rules also infringe First Amendment rights insofar as they favor one class of speakers (local broadcasters) over others (cable programmers). This, too, is more than a mere incidental infringement. As this Court held in *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976), "the concept that government may restrict the speech of some elements of society in order to enhance the relative voice of others is wholly foreign to the First Amendment."

of which standard to apply because it found that, even under the less restrictive *O'Brien* test—and even assuming that the FCC's asserted interest in "preserving free, locally-oriented television" [20] was sufficiently substantial [21] —the rules were clearly impermissible.

The Broadcasters argue that, in applying the *O'Brien* test, the Court of Appeals acted as a "super-agency" and "substitute[d] its judgment concerning the appropriateness of" the must carry rules.[22] But this is hardly a case of the Court of Appeals second-guessing or encroaching on the expertise of an agency. The court invalidated the must carry rules because the FCC failed to make even a minimal showing that those rules were necessary or effective in promoting their intended objective.

The court found, first, that the Commission had "failed adequately to demonstrate that an unregulated cable industry poses a serious threat to local broadcasting and,

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[20] Slip Opinion, Pet. App. at 41a. In its brief in the Court of Appeals, the FCC asserted that the "paramount public interest" underlying the rules was "the preservation of free local television service," FCC Brief at 41 (July 25, 1984), and that their purpose was "to insure that cable television systems distribute television signals and other services to the American public without *destroying or endangering* the basic television broadcast service which has been developed under the Communications Act of 1934." *Id.* at 16 (emphasis added).

[21] *See* Slip Opinion, Pet. App. at 41a-42a:

> The Commission contends that the must-carry rules serve the interest of preserving free, locally-oriented television. The difficult question whether, taken as an abstract proposition, that interest is sufficiently weighty to warrant the rules' interference with First Amendment rights must await resolution in another case. For even if we accept the common wisdom that the goal of encouraging 'localism' qualifies as 'important or substantial,' *United States v. O'Brien, supra,* 391 U.S. at 377, we would be unable to find that the FCC has carried its heavy burden of justification.

[22] Petition at 21.

more particularly, that the must carry rules in fact serve to alleviate that threat." [23] This was not a close call. As the court demonstrated, the FCC had mustered no evidence at all to support the need for, or effectiveness of, the rules:

> In the two decades since the rules' original promulgation, the Commission has never seriously examined any of the admittedly speculative links in the chain of reasoning advanced in support of the rules. In particular, it has never sought support for the assumptions that are the linchpins of its analysis: (1) that without protective regulations cable subscribers would cease to view locally available off-the-air television either because they would disconnect their antennas or because the inconvenience of a switching device would deter them; and (2) that even if some cable subscribers did abandon local television, they would do so in sufficient numbers to affect the economic vitality of local broadcasting.[24]

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[23] Slip Opinion, Pet. App. at 51a.

[24] *Id.* at 48a. The court might also have added that the Commission never even demonstrated that, in the absence of must carry rules, cable operators would be likely to drop a significant number of local broadcast signals. Indeed, there is no reason to expect any wholesale reordering of the status quo now that the rules are gone. With or without the must carry rules, cable operators will continue to carry most local broadcast signals. Local broadcast signals command a major share of cable subscriber viewership nationwide. Therefore, cable operators have every economic incentive to continue carriage of those signals and no incentive to undertake a restructuring of the broadcast-cable relationship.

Although some broadcast stations undoubtedly will be removed from cable systems, these will generally be stations that simply duplicate network programming available on another local station or that have little appeal to cable subscribers. This is most likely to occur where the cable system's channel capacity is fully utilized and the cable operator chooses to replace the must carry station with other programming that is more attractive to subscribers or that is otherwise desirable, for non-economic reasons, in the operator's editorial judgment.

Second, the court found, with equal ease, that even if the must carry rules could be viewed as furthering the substantial governmental interest of preserving local broadcasting, the rules, in their existing form, had a far more extensive impact on protected speech than could conceivably be justified or required by that interest. The court "stress[ed] that '[w]e are not quibbling over fine-tuning' . . . . [I]t is difficult to imagine a less discriminating or more overinclusive means of furthering the Commission's stated objectives." [25] As the court pointed out,

> [t]he rules indiscriminately protect each and every broadcaster regardless of the quantity of local service available in the community and irrespective of the number of local outlets already carried by the cable operator. The 18th station is entitled to carriage no less than the first even if its programming is virtually duplicative of the viewing fare already transmitted over the cable system. Indeed, it is entitled to carriage even if it carries no local programming at all'.[26]

In sum, the Court of Appeals had no difficulty determining that, even under the *O'Brien* test—a test more tolerant of First Amendment intrusions than that which the Supreme Court typically applies in cases involving interference with editorial discretion of the media—the must carry rules could not be upheld. This was not, as the Broadcasters suggest, a sweeping constitutional holding "extending Tornillo's condemnation of 'coerced speech' to virtually any regulation affecting a cable television operator's control over the use of cable channels." [27] It was simply a finding, with respect to these particular rules, that the Commission had "failed entirely to deter-

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[25] *Id.* at 53a, quoting *FEC v. Nat'l Conservative Political Action Comm.*, 105 S. Ct. 1459, 1471 (1985).

[26] *Id.* at 54a (footnotes omitted).

[27] Petition at 16.

mine whether the evil the rules seek to correct 'is a real or merely a fanciful threat,' " [28] and that the rules in any event, are " 'grossly' overinclusive" [29] and "insufficiently tailored to justify their substantial interference with First Amendment rights." [30]

The Broadcasters do not attempt to rebut the court's dispositive findings. They do not point to any evidence that the must carry rules are necessary to the viability of local broadcasting, and they offer no answer at all as to why the rules should provide guaranteed carriage to all local broadcasters, "regardless of the quantity of local service available in the community and irrespective of the number of local outlets already carried by the cable operators." [31]

Indeed, in their recently filed joint petition for rulemaking at the FCC, the National Association of Broadcasters, Association of Maximum Service Telecasters and other broadcasters essentially concede that the FCC's policy objectives could be achieved with rules that were "more narrowly and flexibly drawn." [32] While seeking to persuade this Court that the decision below leaves the FCC "virtually helpless" [33] in seeking to ensure that cable television does not threaten the viability of local broadcasting, the Broadcasters have assured the FCC that "[t]he *Quincy Cable* decision provides room for new rules which satisfy the Court's constitutional objectives while accomplishing Commission aims, benefiting viewers and

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[28] *Id.* at 60a, quoting *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 50 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977).

[29] *Id.* at 54a, quoting *Home Box Office, Inc. v. FCC, supra*, 567 F.2d at 50.

[30] *Id.* at 60a.

[31] *Id.* at 54a.

[32] Petition for Rulemaking, *supra* note 7, at iv.

[33] Petition at 12.

accommodating the essential concerns of broadcasters and cable operators." [34] If, as the unanimous court found, and as the Broadcasters seem to concede, the rules were neither necessary nor narrowly tailored to achieve the FCC's asserted policy objectives, then their intrusion on editorial discretion was unwarranted under the First Amendment standards set forth by this Court.

II. The Decision Below Is Not in Conflict with Previous Decisions of this Court Regarding Cable Television.

Instead of coming to grips with the fundamental flaws and excesses of the must carry rules, the Broadcasters argue that the court's decision somehow conflicts with decisions of this Court. No such conflict exists.

The Broadcasters attempt, first, to show that this Court has already found the must carry rules to be consistent with the First Amendment. But in none of the cases cited by the Broadcasters did the Court even consider the constitutionality of the rules. As the Court of Appeals correctly pointed out, the issue in the Supreme Court cases cited by the Broadcasters was the scope of the FCC's *statutory jurisdiction*, under the Communications Act of 1934, as amended,[35] to impose regulations on cable television systems:

> On several occasions the Supreme Court has addressed questions concerning the breadth of the FCC's jurisdiction over cable television. *See United States v. Southwestern Cable Co.*, [392 U.S. 157, 178 (1968)] (generally approving FCC jurisdiction over cable if 'reasonably ancillary' to its regulation of broadcast television); *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972) (*Midwest I*) (finding rule requiring cable operators to originate local programming within FCC's jurisdiction); *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) (*Mid-*

[34] Petition for Rulemaking, *supra*, at 18.

[35] 47 U.S.C. §§ 151 *et seq.*

> *west II*) (striking down as beyond the FCC's jurisdiction rules requiring cable operators to make channels available for local access). *See also Capital Cities Cable, Inc. v. Crisp, supra*, 104 S. Ct. 2694 (discussing federal preemption of state laws regulating cable).[36]

The notion that this Court, in ruling on the FCC's statutory jurisdiction to adopt certain cable regulations, was also implicitly deciding the constitutionality of the regulations encompassed by that jurisdiction is wholly at odds with the Court's general policy of not deciding constitutional issues whenever it can resolve a case on non-constitutional grounds.[37] Indeed, the Court of Appeals addressed and effectively rebutted the argument that, in the cases cited by the Broadcasters, the Court found the must carry rules to be constitutionally permissible:

> In *Southwestern Cable* the Court explicitly disclaimed reaching any question concerning the validity of the FCC's cable rules. 392 U.S. at 167. In *Midwest I* the plurality opinion suggested in a footnote that the Eighth Circuit had correctly upheld the validity of several cable regulations. 406 U.S. at 659 n.17. However, the context of the reference makes clear that the plurality meant to suggest merely that the Eighth Circuit had correctly held that the particular rules at issue were within the standard set out in *Southwestern Cable* for testing the reach of the FCC's jurisdiction. In any event, as the *Midwest II* Court later acknowledged, the plurality's footnote in *Midwest I* was pure 'dicta.' 440 U.S. at 697 n.7. Indeed, the *Midwest II* Court, though not reaching any constitutional questions implicated by the particular regulations before it, de-

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[36] Slip Opinion, Pet. App. at 18a-19a.

[37] *See, e.g., City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 294 (1982).

scribed those questions as 'not frivolous.' 440 U.S. at 709 n.19.[38]

Second, the Broadcasters argue that the Court of Appeals' holding that cable operators exercise editorial discretion in selecting program services to fill their channels is at odds with two copyright decisions of this Court—*Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968), and *Teleprompter Corp. v. Columbia Broadcasting Systems, Inc.*, 415 U.S. 394 (1974). Those two cases held that, for purposes of the now obsolete Copyright Act of 1909,[39] the retransmission of broadcast signals by cable operators was not a "performance" of copyrighted works and therefore was not subject to copyright liability. Retransmission of broad-

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[38] *Id.* at 19a n.20. In *Capital Cities Cable, Inc. v. Crisp*, 104 S. Ct. 2694 (1984), the Court found that it was within the FCC's jurisdiction to regulate—and to preempt state and local regulation of—signal carriage. Because an Oklahoma statute prohibiting carriage of wine and liquor advertising had the effect of preventing cable systems in Oklahoma from carrying certain out-of-state broadcast stations (some of which were required to be carried by the must carry rules) on their systems, the Court held that the prohibition was in conflict with the FCC's general preemption of signal carriage regulation and also with the must carry rules and was therefore invalid. The Court, however, specifically disavowed any implications regarding the constitutionality of the must carry rules:

> Relying upon the Court's decision in *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979), respondent contends that the FCC rules and regulations reflecting the agency's intent to pre-empt all state regulation of cable signal carriage violate the First Amendment rights of cable operators by depriving them of editorial control over the signals they carry, and therefore may not be invoked as a basis for pre-emption. *We need not consider the merits of this claim*, however, since respondent plainly lacks standing to raise a claim concerning his adversaries' constitutional rights in a case in which those adversaries have never advanced such a claim.

104 S. Ct. at 2701 n.6 (emphasis added).

[39] *See* 17 U.S.C. §§ 1 *et seq.* (1976).

cast signals did not have copyright implications, according to the Court, because "[w]hen a television broadcaster transmits a program, it has made public for simultaneous viewing and hearing the contents of that program." [40] The Court rejected the argument that "[b]y choosing among alternative broadcasting stations," cable operators were exercising sufficient choice and selection to become "performers" for copyright purposes.[41]

The Broadcasters contend that these decisions constitute a finding that cable operators, in selecting broadcast signals for carriage, are "akin to a mere carrier or conduit of expression" [42] and do not exercise editorial discretion. But whatever the merits of such a contention at the time of the Court's decisions, any such interpretation has, in light of the subsequent evolution of cable television, been repudiated by this Court. By 1979, this Court had concluded, in *FCC v. Midwest Video*, *supra*, that cable operators do exercise a significant degree of editorial discretion not only with respect to non-broadcast programming but also with respect to the retransmission of particular broadcast signals:

> As the Commission, itself, has observed, '*both in their signal carriage decisions and* in connection with their origination functions, cable television systems are afforded considerable control over the content of the programming they provide.' [43]

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[40] *Teleprompter Corp. v. Columbia Broadcasting System*, 415 U.S. 394, 409 (1974).

[41] *Id.*

[42] Petition at 11.

[43] 440 U.S. at 707, quoting *Report and Order in Docket No. 20829*, 69 F.C.C.2d 1324, 1333 (1978) (emphasis added) (footnote omitted). Indeed, Congress itself acted quickly to reverse any implication in this Court's decision in *Teleprompter* that cable operators should, for copyright purposes, be viewed as mere conduits for the retransmission of broadcast signals. Under Section 111 of the Copyright Act of 1976, 17 U.S.C. Sec. 111, the retransmission of

III. There Is No Conflict Among the Circuits.

The Broadcasters also contend that the decision below "is in direct conflict with several decisions by other federal Courts of Appeals." [44] The only case cited by the Broadcasters that specifically upheld the must carry rules is *Black Hills Video Corp. v. FCC*, 399 F.2d 65 (8th Cir. 1968)—a case decided when, as the Court of Appeals noted, "cable was in its infancy and apocalyptic visions of its impact were common." [45]

In 1968, the cable operator's editorial function had not yet developed or been recognized by the courts. It was not until 1975 that Home Box Office "revolutionized the cable industry by launching the satellite delivery of its programming service," [46] spawning the wide variety of programming alternatives that now exist, and not until 1979 that this Court explicitly recognized the editorial function performed by cable operators.[47] Indeed, it was not until the 1970's that this Court made clear that the exercise of editorial discretion by all media required strict First Amendment protection.[48]

It is difficult to imagine that the Eighth Circuit would, in light of these subsequent developments, reaffirm its decision in *Black Hills Video Corp. v. FCC*. Indeed, by 1978 the Eighth Circuit had recognized, in *Midwest*

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broadcast signals is specifically treated as a public performance, for which copyright licensing is required. *See Capital Cities Cable, Inc. v. Crisp, supra*, 104 S. Ct. at 2705-06.

[44] Petition at 14.

[45] Slip Opinion, Pet. App. at 19a.

[46] Report of the Committee on Energy and Commerce, H.R. Rep. No. 98-934, 98th Cong., 2d Sess. 21 (1984).

[47] *FCC v. Midwest Video Corp., supra*, 440 U.S. at 707.

[48] *See, e.g., Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm., supra*; *Miami Herald Publishing Co. v. Tornillo, supra.*

Viedo Corp. v. FCC, 571 F.2d 1025 (8th Cir. 1978), *aff'd*, 440 U.S. 689 (1979), that cable television had evolved into a communications medium with First Amendment rights approximating those of the print media. Citing *Miami Herald Publishing Co. v. Tornillo*, *supra*, the Court found that the FCC's rules requiring cable operators to set aside channels for public access impermissibly infringed First Amendment rights because they

> strip[ped] from cable operators, on four of their channels, all rights of material selection, editorial judgment, and discretion enjoyed by other private communications media, and even by the 'semi-public' broadcast media.[49]

The Broadcasters' argument that *Black Hills Video* stands today as an indication of a conflict between the D.C. Circuit and the Eighth Circuit is, therefore, groundless.[50]

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[49] 571 F.2d at 1055-56.

[50] For similar reasons, the Ninth Circuit's decision in *Great Falls Community TV Cable Co. v. FCC*, 416 F.2d 238 (9th Cir. 1969), which rejected, in summary fashion, a First Amendment challenge to FCC rules requiring cable operators to delete the signals of distant broadcast stations whose network programming duplicated the programming of local stations, does not evidence a conflict between the circuits. In a recent decision, the Ninth Circuit specifically recognized that "cable technology has . . . evolved significantly since the time of *Black Hills Video*" and that "*Black Hills Video*, therefore, is a doubtful precedent today." *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396, 1404 (9th Cir. 1985), *jurisdictional statement filed*, 54 U.S.L.W. 3170 (U.S. Sept. 24, 1985) (No. 85-390). The Ninth Circuit's current view of cable's First Amendment status echoes that of the D.C. Circuit:

> In addition to originating their own programming, cable television operators exercise considerable editorial discretion regarding what their programming will include . . . . Editorial judgment is entitled to First Amendment protection . . . . Undeniably, cable operators do transmit programs produced by others. To the extent an operator does so, however, we believe

Indeed, there is no longer any doubt or disagreement among any of the circuits that cable is a medium whose speech is protected by the First Amendment.[51] There is, to be sure, some disagreement as to the extent to which their First Amendment status immunizes cable operators from franchise regulations that do not directly affect program content and editorial discretion.[52] But there is no conflict with the decision of the Court of Appeals that the must carry rules interfere with editorial discretion.

> it would be treated for First Amendment purposes as would be theater owners, booksellers, and concert promoters. Their First Amendment protection is not diminished because they distribute or present works created by others.

Id. at 1410 n.10.

The Broadcasters' assertion that "*Black Hills* was cited with approval" by the Tenth Circuit in *Community Communications Co. v. City of Boulder*, 630 F.2d 704, 713 (10th Cir. 1980), Petition at 14 n.15, is not simply misleading; it is false. What the Broadcasters have cited is the dissenting opinion of Judge Markey. In that opinion, Judge Markey does, indeed, note that the *city* had cited *Black Hills Video* to support its argument that restrictions on a cable operator's right to expand his service area did not violate the First Amendment. Judge Markey found the City's reliance on *Black Hills Video* to be misplaced. The majority, meanwhile, did not reach the First Amendment issues and did not cite *Black Hills Video* at all, much less "with approval."

[51] *See, e.g., Preferred Communications, Inc. v. City of Los Angeles, supra*; *Tele-Communications of Key West, Inc. v. United States*, 757 F.2d 1415 (D.C. Cir. 1985); *Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985); *Omega Satellite Products v. City of Indianapolis*, 694 F.2d 119, 127 (7th Cir. 1982); *Community Communications Co., Inc. v. City of Boulder*, 660 F.2d 1370, 1376 (10th Cir. 1981); *Midwest Video Corp. v. FCC*, 571 F.2d 1025 (8th Cir. 1978), *aff'd*, 440 U.S. 689 (1979); *Home Box Office, Inc. v. FCC, supra.*

[52] *Compare Preferred Communications, Inc. v. City of Los Angeles, supra* and *Tele-Communications of Key West, Inc. v. United States, supra, with Omega Satellite Products v. City of Indianapolis, supra*, and *Community Communications Co., Inc. v. City of Boulder, supra.*

And there is no conflict with the court's determination that even under the *O'Brien* test, the rules could not survive because the Commission's asserted rationale for the rules had no support and because the rules suppressed far more speech than was conceivably necessary to achieve the Commission's stated objectives. Given this absence of evidentiary support and disparity of means and ends, it is hard to imagine how the must carry rules could have survived any court's First Amendment scrutiny.

IV. The FCC Is Not Seeking Review of the Decision Below.

This is not a case in which a longstanding rule that a federal agency believes to be essential to its public interest objectives has been invalidated. The FCC, in deciding not to pursue review of the decision below, has recognized that the specific must carry rules that it adopted 20 years ago are no longer necessary or appropriate. Even if the court's decision were to be reversed, it is improbable that the FCC would reinstate the rules without significantly narrowing their scope and effect.

The FCC agreed with the Court of Appeals that the rules had "displaced consumer choice in many cases and so interfered with the marketplace." [53] The FCC also endorsed the decision as "a positive step toward recognizing full First Amendment protection for all forms of electronic media." [54] And, while expressing its preference that elimination of the must carry rules be accompanied by elimination of the compulsory copyright license for retransmission of broadcast signals, the FCC's majority nowhere suggested that it still viewed the rules as necessary to the preservation of local broadcasting. Indeed,

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[53] Public Notice, *supra*, Pet. App. at 138a.

[54] *Id.*

even Commissioner Quello, in dissenting from the FCC's decision not to appeal the court's decision, conceded that the must carry rules should, in any event, "be revisited to address legitimate concerns raised by the court," and he "favor[ed] a Notice of Proposed Rulemaking to do just that." [55]

Thus, whether or not the decision below is reviewed by this Court, the likely outcome is the same—a rulemaking proceeding aimed at reassessing whether must carry rules are necessary to promote any public policy interest and, if so, at revising the rules to ensure that their impact on cable operators' editorial discretion is no greater than necessary to achieve the FCC's objectives. In these circumstances, review is unnecessary and inappropriate.

CONCLUSION

For the foregoing reasons, the Writ should be denied.

Respectfully submitted,

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[55] Dissenting Statement of Commissioner James H. Quello, Pet. App. at 140a.